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14
15 **UNITED STATES DISTRICT COURT**
16
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 SAMBREEL HOLDINGS LLC; YONTOO LLC;
19 and THEME YOUR WORLD LLC,

20 Plaintiffs,

21 vs.

22 FACEBOOK, INC.,

23 Defendant.

24 CASE NO. 12-CV-00668-CAB-KSC

25 **DEFENDANT FACEBOOK, INC.'S**
REPLY BRIEF IN SUPPORT OF
MOTION TO DISMISS COMPLAINT
PURSUANT TO FEDERAL RULES OF
CIVIL PROCEDURE 12(B)(3) AND
12(B)(6)

26 Judge: Hon. Cathy Ann Bencivengo
27 Hearing Date: June 22, 2012
28 Hearing Time: 2:30 p.m.
Dept.: Courtroom 2

29 **ORAL ARGUMENT REQUESTED**

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INTRODUCTION¹

Sambrell’s Opposition is founded upon twin fallacies: that PageRage is a “competitor” to Facebook, and that this case involves anything more than Facebook’s lawful enforcement of its Terms of Use. Labels and legal conclusions cannot mask the true nature of the parties’ relationship or the three undisputed facts at the heart of this case:

1. Facebook provides a free social networking service, and its Terms of Use preclude the display of unauthorized third-party ads on that service.
2. Sambrell operates PageRage, an adware program designed *exclusively* for use on Facebook that “layers” unauthorized third-party ads over Facebook’s service before it is displayed to users.
3. In 2011, Facebook enforced its Terms of Use by refusing to provide its service to users or to do business with advertising providers who used the PageRage adware to “layer” unauthorized third-party ads into Facebook.

Thus, while Sambrell’s Complaint is dressed in the trappings of antitrust law, this is not an antitrust case. No amount of repetition of antitrust buzzwords (“group boycott,” “product tying,” “anticompetitive”) can transform Facebook’s attempt to control its own product into anything other than what it was—a protected unilateral refusal to deal with a maker of adware and its enablers.

Sambreel does not even dispute that antitrust law permits Facebook to require third parties, like Sambreel, to follow Facebook’s Terms of Use. Indeed, Sambreel concedes that it was thrown off of the Facebook Platform because “the PageRage functionality was not permitted,” Compl. ¶ 24, and it claims no legal wrong from the ouster. Its Opposition instead retreats to the remarkable proposition that while antitrust law permitted Facebook to refuse to deal with Sambreel directly, Facebook now is somehow barred from enforcing its Terms to prevent the same activity indirectly by denying access to advertising providers and users that facilitate Sambreel’s adware. The law provides for no such thing. Courts in this circuit have ***three times*** rejected antitrust claims based on a website’s efforts to block its users from using a third party’s products or services. Sambreel cites ***not one case*** to the contrary.

Sambrell's last line of defense appears to be the claim that Facebook's unilateral refusal to deal is somehow suspect because the PageRage adware program allegedly resides on the end user's computer rather than directly hacking into Facebook's servers. This is a distinction without a

¹ All capitalized and defined terms are given the meaning provided in Facebook Inc.’s Memorandum of Points and Authorities in Support of Motion to Dismiss (“Motion”).

1 difference. Sambreel's scheme of "indirect dealing" is the equivalent of inserting unauthorized ads
 2 and content into the *New York Times*. It does not matter whether Sambreel tampers with the *Times'*
 3 printing press, hijacks its delivery truck, or doctors its newspaper on a subscriber's doorstep.
 4 Similarly, in this case, the only way a Facebook user can interact with Facebook's product is for its
 5 webpages to display correctly on the user's computer browser. That Sambreel alleges its "layering"
 6 occurs near the end of the delivery process has no bearing on its legality,² and it certainly does not
 7 prevent Facebook's actions against those users and advertising providers who ignore binding terms
 8 and facilitate prohibited malware and adware. No legal principle requires Facebook to carry parasitic
 9 free-riders, whether they attack directly or indirectly.

10 Sambreel's frivolous attempt to turn Facebook's garden-variety enforcement of its Terms of
 11 Use into a federal antitrust case should be dismissed for the following reasons:

12 **First**, Sambreel has alleged no facts that remove this case from the realm of a lawful refusal to
 13 deal. *See Verizon Commc'n Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004)
 14 ("The Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged
 15 in an entirely private business, freely to exercise his own independent discretion as to parties with
 16 whom he will deal.'"). In its Opposition, Sambreel attempts to avoid this principle by arguing that (a)
 17 it no longer wants a direct, legitimate relationship with Facebook and (b) its Complaint does not use
 18 the term "refusal to deal," but rather "group boycott" and "tying agreement." However, the law
 19 disregards Sambreel's labels and assesses the actual conduct alleged, and courts in this circuit have
 20 repeatedly affirmed a website's right to refuse to deal with a third party in this context. *E.g.*
 21 *Facebook, Inc. v. Power Ventures, Inc.*, 2010 WL 3291750, at *13-14 (N.D. Cal. July 20, 2010)
 22 (dismissing antitrust claims and affirming Facebook's right to prohibit users from using a third-party
 23 product to access Facebook's service pursuant to its Terms of Use).

24 **Second**, Sambreel has still failed to identify any antitrust injury to support Counts I-IV. The

25
 26 ² While not necessary for resolving this Motion, Sambreel's admitted "layering" of its own
 27 advertisements into a modified version of Facebook's webpage violates the Lanham Act. *See Hard*
28 Rock Cafe Intern. (USA) Inc. v. Morton, 1999 WL 717995, at *25 (S.D.N.Y. Sept. 9, 1999) (holding
 that the defendant's attempt to "advertise or sell CDs" in an internet window "framed" within the
 Hard Rock website violated Hard Rock's trademark rights); *Washington Post Co. v. Gator Corp.*, No.
 civ-02-00909-A (E.D. Va. July 16, 2002) (enjoining an adware maker from "[a]ltering or modifying"
 the plaintiffs' website "in any way, including its appearance or how it is displayed").

1 Ninth Circuit has held that prohibiting the use of a third-party product in connection with one's own
 2 online service does not create antitrust injury. *See LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x
 3 554, 557 (9th Cir. 2008) ("[Plaintiff] does not explain how MySpace's actions *on its own website* can
 4 reduce consumers' choice or diminish the quality of their experience on other social networking
 5 websites[.]") (emphasis in original). Sambreel attempts to distinguish *LiveUniverse* by suggesting that
 6 PageRage suffered greater harm than the plaintiff's product in that case, but this borders on the absurd
 7 and can be explained quite succinctly: The product in *LiveUniverse* was designed to be something
 8 more than a parasite on **one** social networking service; PageRage was not. The extent of PageRage's
 9 alleged injury does not transform it into an antitrust injury and does not reverse the Ninth Circuit's
 10 teaching.

11 **Third**, Sambreel's putative per se claims are square pegs fighting round holes. Contrary to
 12 Sambreel's overreaching argument, the facts underlying its group boycott claim (Count I) and product
 13 tying claim (Count II) are not "**indistinguishable**" from the facts in *Fashion Originators' Guild of*
 14 *Am., Inc. v. FTC*, 312 U.S. 457 (1941) and *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S.
 15 451 (1992), respectively. *Fashion Originators* involved a classic boycott in which 176 competing
 16 apparel manufacturers agreed to boycott any retailer nationwide that did not agree to boycott certain
 17 other apparel manufacturers. 312 U.S. at 465-67. Here, Sambreel has not alleged that Facebook
 18 organized any type of boycott with its horizontal competitors such as MySpace, Google+, or other
 19 websites. Stripped of the "boycott" label, Sambreel merely alleges that **Facebook alone** refused to
 20 allow users or advertising providers to use or serve ads **on Facebook** if they continued to violate its
 21 neutral terms by facilitating Facebook-specific adware like PageRage.

22 And in *Eastman Kodak*, the Supreme Court invoked the per se rule for product tying because
 23 Kodak refused to sell its copier parts unless customers agreed not to buy copier service from **any party**
 24 **besides Kodak**. 504 U.S. at 462-463. Here, Facebook does not force any customer to buy any
 25 product, Sambreel admits that Facebook allows numerous third parties to offer what Sambreel defines
 26 as "social networking enhancement products," and Sambreel does not allege that Facebook sells any
 27 of these so-called "enhancement" products. The heart of Sambreel's "tying" argument is simply an
 28 assertion that Facebook cannot exclude **PageRage alone**, which would expand antitrust liability

1 beyond any known bounds. *See Power Ventures, Inc.*, 2010 WL 3291750, at *13-14 (“Defendants
 2 cite no authority for the proposition that Facebook is somehow obligated to allow third-party websites
 3 unfettered access to its own website[.]”).

4 **Fourth**, Sambreel has still failed to allege sufficient facts to support the antitrust “markets”
 5 alleged in support of Counts I-IV. While its Opposition suggests that a plaintiff’s burden is merely to
 6 *say* that the alleged product market lacks interchangeability, this is not the law. *In re ATM Fee*
 7 *Antitrust Litig.*, 768 F. Supp. 2d 984, 994-95 (N.D. Cal. 2009) (“Plaintiffs must **plead facts** showing
 8 that their product market bears a rational relation to the methodology courts prescribe to define a
 9 market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity of
 10 demand, and it must be plausible.”) (punctuation and alteration omitted).³

11 **Fifth**, Sambreel has not addressed the myriad other reasons its antitrust claims are deficient.
 12 Its attempt to rely on the “quick look” doctrine to excuse these basic pleading failures is misplaced.
 13 *Cal. ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1178 (9th Cir. 2010) (explaining that the limited
 14 circumstances in which the quick look doctrine may apply).

15 **Sixth**, none of Sambreel’s follow-on state law claims should survive the motion to dismiss.
 16 Sambreel ignores federal and state court decisions that have consistently held that allegations which
 17 fail under the Sherman Act also fail under California’s Section 17200 of the Business and Professions
 18 Code (“Section 17200”). Sambreel’s tortious interference claims fail because of pleading deficiencies
 19 as well as a contract-enforcement privilege apparent from the face of its Complaint.

20 Finally, for the reasons discussed immediately below, Sambreel’s attempt to avoid the scope of
 21 Facebook’s forum selection clause is meritless.

22 **ARGUMENT**

23 **I. SAMBREEL HAS NOT MET ITS BURDEN OF ESTABLISHING VENUE**

24 Sambreel does not deny that it agreed to Facebook’s Terms of Use. And it offers no
 25 “compelling and countervailing reason” for refusing to honor Facebook’s forum selection clause even
 26 though Sambreel “bear[s] a heavy burden” in challenging it. *See Murphy v. Schneider Nat’l, Inc.*, 362
 27 F.3d 1133, 1140 (9th Cir. 2004). The clause encompasses “any claim, cause of action or dispute

28³ All emphases added unless otherwise noted.

1 (claim) you have with us arising out of or relating to this Statement or Facebook,” defined as “the
 2 features and services we make available, including through (a) our website at www.facebook.com.⁴”
 3 See Clark Decl. (Doc. No. 22-3), Ex. A §§ 15.1, 17.1. Sambreel contrives a distinction between
 4 claims relating to Facebook’s “features and services”—which Sambreel admits fall within the scope of
 5 the clause—and its claims concerning group boycott and “gating.” See Opp’n at 7-8. But Sambreel’s
 6 claims plainly relate to Facebook’s “features and services” because the crux of this dispute is about
 7 who gets to control Facebook’s features and services: Facebook or Sambreel.

8 Sambreel admits that its product alters the presentation of Facebook’s service. See Compl. ¶¶
 9 2, 24; Opp’n at 4. Indeed, the entire premise behind Sambreel’s PageRage product is “to display
 10 advertising to individuals while they are accessing the Facebook website.” See Compl. ¶ 2. This
 11 dispute arises directly from Sambreel’s efforts to free-ride on Facebook features and services by
 12 “adding layers” of ads and designs when users visit the Facebook website. Because Sambreel’s
 13 “antitrust” claims challenge Facebook’s response to Sambreel’s ad-layering, the claims are directly
 14 related to Facebook and thus fully encompassed by the forum selection clause. Moreover, Sambreel’s
 15 claims are directly related to the Terms of Use themselves because the purported “group boycott” and
 16 “gating” claims are premised on Facebook’s enforcement of its Terms. Sambreel also does not
 17 dispute that it agreed to the Terms of Use by accessing Facebook to develop PageRage.

18 Sambreel’s next argument, that forum selection clauses encompass non-contract claims only if
 19 their resolution relates to contract interpretation, is similarly unavailing. See Opp’n at 8-9. “The
 20 scope of the claims governed by a forum selection clause depends [on] the language used in the
 21 clause.” *Perry v. AT&T Mobility LLC*, 2011 WL 4080625, at *4 (N.D. Cal. Sept. 12, 2011). In the
 22 cases on which Sambreel relies, the forum selection clauses were limited to claims about the particular
 23 agreements at issue.⁴ Facebook’s clause, conversely, is broad and extends beyond claims relating to
 24 the Terms of Use to include “any claim . . . relating to . . . [Facebook’s features and services].” See

25
 26 ⁴ See, e.g., *Manetti-Farrow, Inc. v. Gucci Amer., Inc.*, 858 F.2d 509, 511 (9th Cir. 1988) (forum-
 27 selection clause was limited to “any controversy regarding interpretation or fulfillment of the present
 28 contract”); *E. & J. Gallo Winery v. Encana Energy Serv., Inc.*, 1:03-cv-05412-LJO-DB, Doc. No.
 374-3 at 6 (S.D. Cal. Feb. 9, 2005) (“Any legal action, suit or proceeding with respect to this
 Agreement ”); *Ingenieria Alimentaria Del Matatipac S.A. DE C.V. v. Ocean Garden Prods., Inc.*,
 3:06-cv-02400-WQH-POR, Doc. No. 5-4 at 10 and Doc. No. 5-5 at 10 (S.D. Cal. Dec. 22, 2006)
 (identifying the specific agreements for which the clause applied).

1 *supra* at 4-5. This language amply covers Sambreel's non-contractual claims. *See Androutsakos v.*
 2 *M/V PSARA*, 2003 WL 23538012, at *5 (D. Or. July 7, 2003); *Chang Wei Lee v. XO Commc'ns, LLC*,
 3 2012 WL 164080, at *2, *4 (C.D. Cal. Jan. 13, 2012) (holding that clause reached tort claims where
 4 its language “[was] not limited to only contract disputes.”).

5 Finally, Sambreel's assertions about its own purportedly conflicting forum selection clause are
 6 meritless. The www.pageage.com forum-selection clause allegedly in effect when Sambreel filed
 7 this action⁵ states: “any controversy, claim or dispute arising out of or relating in any way to your use
 8 of the Site and Services shall be resolved by final and binding **arbitration.**” Hankinson Decl., Ex. B at
 9 (Doc. No. 34-3). Even were this provision to apply, it offers no reason to avoid dismissal. First,
 10 because it calls for arbitration of disputes, it still provides no basis for venue in this Court. That
 11 Sambreel never asserted the clause reveals the make-weight nature of its invocation in the Opposition.
 12 Second, the terms of this provision plainly exclude Sambreel's claims against Facebook. It only
 13 reaches claims “relating . . . to your [i.e., Facebook's] use of [Sambreel's] Site and Services.” *Id.* But
 14 Sambreel's claims are entirely unrelated to Facebook's alleged use of **Sambreel's** “Site and Services,”
 15 and instead challenge the way that **Facebook** provides its own service and features. Sambreel's
 16 purported forum selection clause has no application to claims in this case, and this action should be
 17 dismissed or transferred to the Northern District of California.⁶

18 II. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

19 A. Sambreel Has Identified No Allegations that Differentiate this Case from a Lawful 20 Refusal to Deal (Counts I-IV)

21 In the Motion, Facebook explained that the antitrust laws protect Facebook's rights to control
 22 its product and choose its business partners. *See* Mot. at 12-14. A key component of these rights is

23 ⁵ Sambreel asserts that venue is proper in this Court under the Terms of Service that allegedly
 24 remained in effect until December 2011. *See* Opp'n at 9-10 & 9 n.6. But the Terms of Service
 25 provide that any revisions are incorporated automatically by continued use of the service.

26 ⁶ The cases Sambreel cites are inapposite. *See* Opp'n at 10. Three involve motions for a
 27 **discretionary** transfer under 28 U.S.C. § 1404—transfer that applies a standard entirely different
 28 from that under Fed. R. Civ. P. 12(b)(3), which requires the non-moving party to establish that venue
 is proper. *See B & O Mfg., Inc. v. Home Depot U.S.A., Inc.*, 2007 WL 3232276, at *3 (N.D. Cal.
 Nov. 1, 2007); *Powerscreen USA LLC v. D&L Equip., Inc.*, 2008 WL 2944994, at *1 (W.D. Ky. July
 28, 2008); *Measurement Specialties, Inc. v. Stayhealthy.com*, 275 F. Supp. 2d 638, 640 (E.D. Pa.
 2003). The fourth, *Express Logistics Sys. Corp. v. Eagle Mountain Ventures, LLC*, is an equally
 irrelevant dispute over a motion to remand. 2004 WL 2445239, at *1 (N.D. Cal. Oct. 29, 2004).

1 the ability to establish neutral terms and conditions for the use and distribution of its product, and to
 2 enforce those terms against violators and free-riders. *See id.*; *Pac. Bell Tel. v. Linkline Commc'n*, 129
 3 S. Ct. 1109, 1118 (2009) (“As a general rule, businesses are free to choose the parties with whom they
 4 will deal, as well as the prices, terms, and conditions of that dealing.”); *see Morris Commc'n Corp. v.*
 5 *PGA Tour, Inc.*, 364 F.3d 1288, 195-96 (11th Cir. 2004) (holding that an alleged monopolist’s
 6 restrictions on the dissemination of its product were valid to prevent free riding).

7 Sambreel does not seriously dispute these principles, but argues that they are “inapposite”
 8 because Sambreel chose to label Facebook’s conduct as “group boycott” and “product tying.” *See*
 9 *Opp'n* at 12. But “[e]specially in the area of antitrust law, labels do not suffice when analysis is
 10 necessary.” *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 492 (1982) (J. Rehnquist, dissenting).
 11 The case-dispositive allegations are apparent on the face of Sambreel’s Complaint and the documents
 12 it references:

- 13 • Facebook allows users, application developers, and advertising providers to⁷ use its social
 14 network if they abide by its Terms of Use. Compl. ¶ 20; Clark Decl. ¶ 2, Ex. A.
- 15 • Facebook can deny access to any party that “violate[s] the letter or spirit of [the Terms of
 16 Use],” including “*facilitat[ing]*” any violation. Clark Decl. ¶ 2, Ex. A.
- 17 • The Terms of Use prohibit “show[ing] third-party ads . . . on Facebook” and “do[ing] anything
 18 that could . . . impair the proper working of Facebook.” Clark Decl. ¶ 2, Ex. A.
- 19 • Sambreel’s PageRage adware “layers” unauthorized advertisements into the webpages that
 20 users see “while they are accessing the Facebook website.” Compl. ¶ 2.
- 21 • Facebook instructed Sambreel that “the PageRage functionality was not permitted as part of
 22 the Facebook Platform.” Compl. ¶ 24.
- 23 • Sambreel altered its PageRage adware to operate outside of the Facebook Platform. *Id.*
- 24 • In 2011, Facebook allegedly informed advertising providers that they would not be permitted
 25 to use Facebook if they used PageRage to “layer” third-party ads. Compl. ¶ 32.
- 26 • In 2011, Facebook allegedly informed users they would not be permitted to access Facebook if
 27 they used PageRage to “layer” third-party ads. Compl. ¶ 38.

28 Based on Sambreel’s own Complaint, Facebook has done nothing more than unilaterally refuse to deal
 29 with Sambreel directly (by refusing to allow PageRage on the Facebook Platform) and indirectly (by
 30 refusing to provide access to users and ad providers who modify Facebook’s service with prohibited

⁷ The Clark Declaration attaches Facebook’s Terms of Use and related policies, which are incorporated by reference in Sambreel’s complaint. *See Mot.* at 5 n. 4.

1 adware). Attaching a different legal label does not change the conclusion.

2 To avoid dismissal, Sambrell attempts to conjure up a distinction that the case law protects
 3 **only** Facebook's refusal to deal with Sambrell directly, not its refusal to deal with "third parties" or
 4 "customers" that use PageRage on Facebook. *See* Opp'n at 12-13. Sambrell ignores a triad of cases
 5 in this circuit holding the opposite in this very industry. **First**, in *LiveUniverse, Inc. v. MySpace, Inc.*,
 6 the plaintiff alleged that MySpace prohibited its users' choice to use the plaintiff's products by
 7 "destroy[ing]" **its users'** ability to upload the plaintiff's video products and "delet[ing]" all references
 8 and links to the plaintiff's website on the users' MySpace pages. 2007 WL 6865852, at *11 (C.D.
 9 Cal. June 4, 2007). Even assuming that MySpace was an actual monopolist, the court concluded that
 10 MySpace's action on its own service was fully sanctioned under the antitrust laws. *Id.* at *13
 11 ("MySpace may be viewed as merely preventing LiveUniverse from advertising its website free of
 12 charge on the MySpace site."), *aff'd* 304 F. App'x 559, 556-57 (9th Cir. 2008).

13 **Second**, in *Universal Grading Service v. eBay, Inc.*, eBay prevented users from selling coins as
 14 "certified" unless one of five approved coin-grading services had graded them, and actively removed
 15 **users' listings** for "certified" coins graded by other coin grading services. 2011 WL 846060, at *2
 16 (N.D. Cal. Mar. 8, 2011). In response to a class complaint on behalf of blacklisted grading services,
 17 users with excluded listings, and consumers claiming increased coin prices, the court dismissed all
 18 antitrust claims. *Id.* at * 3. Even assuming that eBay was a monopolist, the court explained: "eBay's
 19 Policy could be described generally as eBay's refusal to deal with coin grading companies who
 20 attempt to list coins as 'certified' although they have not been so designated under eBay's Policy. But
 21 a refusal to deal by itself cannot establish an antitrust injury." *Id.* at *9.

22 **Third**, in *Power Ventures*, Facebook users sought to use a third-party product from Power.com
 23 that purported to allow them to aggregate their social networking data through a single portal. 2010
 24 WL 3291750, at *13. After Facebook enforced its Terms of Use that "prohibit[ed] **users** from logging
 25 into Facebook through third-party websites, such as Power.com," Power.com brought antitrust claims
 26 against Facebook. *Id.* at *13. Relying specifically on **Facebook's "right to manage access to and use**
 27 **of its website,"** the district court dismissed the claims and affirmed Facebook's enforcement of its
 28 Terms of Use. *Id.* at *14 ("Defendants cite no authority for the proposition that Facebook is somehow

1 obligated to allow third-party websites unfettered access to its own website simply because some other
 2 third-party websites grant that privilege to Facebook.”).

3 **B. Sambreel Fails to Distinguish Ninth Circuit Case Law Requiring Dismissal of this
 4 Complaint for Lack of Antitrust Injury (Counts I-IV)**

5 Antitrust injury requires injury to competition, and the inability to use PageRage to modify and
 6 impair Facebook’s service simply does not qualify under Ninth Circuit law. *See* Mot. at 14-16;
 7 *LiveUniverse*, 304 F. App’x at 557. In response, Sambreel argues (a) that antitrust injury does not
 8 actually require injury to competition; (b) that asserting a boycott or tying agreement removes the
 9 need to plead antitrust injury; and (c) that Sambreel has adequately alleged “increased prices for
 10 advertisers, the elimination of a direct low-cost competitor, and reduced choice for consumers.” *See*
 11 Opp’n at 12-17. None of these arguments hold water.

12 **First**, Sambreel’s suggestion that requiring “harm to competition” is the “incorrect legal
 13 standard” is puzzling given that courts in this circuit have repeatedly endorsed it. *Cascade Health
 14 Solutions v. PeaceHealth*, 515 F.3d 883, 902 (9th Cir. 2008) (“[T]he antitrust laws’ prohibitions focus
 15 on protecting the competitive process and not on the success or failure of individual competitors.”);
 16 *LiveUniverse*, 304 F. App’x at 557 (“Antitrust injury is injury of the type the antitrust laws were
 17 intended to prevent, which means harm to the process of competition and consumer welfare, not harm
 18 to individual competitors.”) (citations and punctuation omitted); *Blind Doctor*, 59 Fed. R. Serv. 3d
 19 635, 2004 WL 1976562, at *8 (N.D. Cal. Sept. 7, 2004); *see also* Mot. at 14-15.⁸

20 **Second**, Sambreel cannot avoid pleading antitrust injury by merely attaching labels to
 21 Facebook’s conduct. Sambreel spends several paragraphs arguing the following tautology: (a) courts
 22 have found that group boycotts and product tying cases involve antitrust injury; (b) Sambreel has
 23 alleged both of those claims; (c) thus, Sambreel has pled antitrust injury. *See* Opp’n at 14-15. But

24 ⁸ Sambreel cites two cases for its argument in favor of a different legal standard based on mere
 25 “injury to the plaintiff.” *See* Opp’n at 13. The Supreme Court’s decision in *McCready*, 457 U.S. at
 26 482-83 stated only that a plaintiff need not show a “lessening of competition” in the form of being
 27 “driven from the market” or raised prices, and then described in detail how the anticompetitive
 28 scheme at issue reduced the plaintiff’s options for selecting among medical practitioners. The Fifth
 Circuit’s decision in *Doctor’s Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 305
 (5th Cir. 1997) held specifically that the standing inquiry entails a check on whether the lawsuit
 would serve antitrust law’s goal of “assist[ing] competition, not competitors.” *Id.* (“Otherwise
 ordinary tort and contract actions have inspired ‘antitrust’ lawsuits that do not fulfill these goals.”).

1 even where a plaintiff has adequately pled an antitrust claim, courts must independently analyze
 2 whether the alleged injury is the type of harm that Congress intended to remedy with the antitrust
 3 laws. *See LiveUniverse*, 304 F. App'x at 557; *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d
 4 367, 371 (9th Cir. 2003). Antitrust injury serves the gate-keeping role of ensuring that standard
 5 contract and tort disputes are not improperly elevated to treble-damages federal antitrust cases.

6 **Third**, Sambrell cannot escape the *LiveUniverse* and *Universal Grading* decisions applying
 7 the doctrine of antitrust injury in *this specific context*. Like Sambrell, the plaintiff in *LiveUniverse*
 8 alleged that MySpace—an assumed monopolist—harmed its business and reduced consumer options
 9 by refusing to allow MySpace users to upload the plaintiff's videos or share its links. *LiveUniverse*,
 10 304 F. App'x at 557; *LiveUniverse*, 2007 WL 6865852, at *11. The Ninth Circuit affirmed the
 11 complaint's dismissal, explaining that "LiveUniverse does not explain how MySpace's actions *on its*
 12 *own website* can reduce consumers' choice or diminish the quality of their experience on *other* social
 13 networking websites[.]" 304 F. App'x at 557 (emphasis in original). Sambrell argues that its theory
 14 of antitrust injury is "vastly different" because "MySpace's actions did not prevent LiveUniverse from
 15 offering its product," while "Sambrell alleges that Facebook has interfered with Sambrell's ability to
 16 operate its product *at all*." *See* Opp'n at 16 (emphasis in original). Of course, the only basis for this
 17 "distinction" is that LiveUniverse created a standalone product and website, while Sambrell designed
 18 PageRage to be a Facebook-exclusive adware parasite with no independent utility. This is not the type
 19 of "competition" the Sherman Act was intended to foster; *LiveUniverse* is controlling.⁹

20 **Fourth**, Sambrell does not have standing to assert its claimed injury for "increased prices for
 21 advertisers." Sambrell does not claim to be an advertiser whose ads are directed at Facebook users,
 22 and it is thus not the proper party for such a claim. *See* Mot. at 16, n. 12; *Hairston v. Pacific 10*
 23 *Conf.*, 101 F.3d 1315, 1322 (9th Cir. 1996) (explaining that "the existence of other, more appropriate

24
 25 ⁹ Sambrell also suggests that the *Universal Grading* decision is distinguishable because it was about
 26 an exclusionary policy that rendered eBay "safer" and "too good." *See* Opp'n at 16. While
 27 Sambrell's reasoning is hard to follow, the *Universal Grading* court was less ambiguous about the
 28 significance of antitrust injury: "eBay's Policy could be described generally as eBay's refusal to deal
 with coin grading companies who attempt to list coins as 'certified' although they have not been so
 designated under eBay's Policy. . . . [P]laintiffs do not explain how eBay's actions *on its own website*
 can reduce consumers' choices or diminish the quality of their experience on other auction websites
 and thus cause antitrust injury." 2011 WL 846060, at *9.

1 plaintiffs” weighs against antitrust standing). Moreover, the purported injury is still tied to advertising
 2 *on facebook.com*, which again implicates the heart of the Ninth Circuit’s reasoning in *LiveUniverse*:
 3 Nothing about Facebook’s attempt to limit adware on *its own website* prevents Sambrell, consumers,
 4 or advertisers from using such adware on “*other* social networking websites” or other websites
 5 generally. *LiveUniverse*, 304 F. App’x at 557. Any impairment to Sambrell’s Facebook-specific
 6 scheme is not the type of injury that the antitrust laws were intended to remedy.

7 **C. Sambrell Has Not Pled a Per Se Claim under Section 1 (Counts I & II)**

8 Separate and independent from the dispositive issues above, Sambrell has not pled a per se
 9 claim for group boycott (Count I) or product tying (Count II). *See* Mot. at 16-21. While Sambrell
 10 asserts that this case is “indistinguishable” from the classic cases in those categories, *see* Opp’n at 3,
 11 even a superficial analysis reveals otherwise. In truth, Sambrell is asking this Court to expand the
 12 range of conduct deemed per se illegal far beyond currently recognized bounds. *See Leegin Creative*
 13 *Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“To justify a *per se* prohibition a
 14 restraint must have manifestly anticompetitive effects and *lack . . . any redeeming virtue*.”).

15 **1. Sambrell Has Not Pled a Group Boycott between Horizontal Competitors**

16 Sambrell has not alleged a per se group boycott, and a simple comparison with the boycott
 17 case that Sambrell claims to be indistinguishable, *Fashion Originators*, 312 U.S. 457, shows why.

18 In *Fashion Originators*, the Supreme Court confronted a true group boycott. *Id.* at 461-62.
 19 The boycott involved *176 competing manufacturers* of high-end women’s clothing that banded
 20 together and agreed not to sell their products to any retail stores that stocked lower-priced garments.
 21 *Id.* “As a result of their efforts, approximately *12,000 retailers* throughout the country [] signed
 22 agreements to ‘cooperate’ with the [high-end manufacturers’] boycott program,” which was rigorously
 23 monitored and enforced. *Id.* The Court explained that the cartel of manufacturers “is in reality an
 24 extra-governmental agency, which prescribes rules for the regulation and restraint of interstate
 25 commerce, and provides extra-judicial tribunals for determination and punishment of violations[.]”
 26 *Id.* at 465. To put it mildly, Facebook’s unilateral regulation of access to *its own website* is
 27 “distinguishable,” and it does not implicate the per se rule for the following reasons.

28 **First**, Sambrell has failed to allege a horizontal boycott among direct competitors as found in

1 *Fashion Originators*. See *Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1092 (9th Cir.
 2 2000) ("The Supreme Court has found that the per se rule for group boycotts should be limited to
 3 cases 'involving horizontal agreements among direct competitors.'"). Unlike those 176 competing
 4 apparel manufacturers, Facebook has not entered into any type of agreement with its direct
 5 competitors: MySpace, Google+, or any other website. Facebook has merely set neutral terms for
 6 how third parties may use Facebook's own website. Sambreel attempts to plead around this glaring
 7 fact by arguing that application developers that offer their applications through the Facebook Platform
 8 are actually Facebook's "direct competitors" for purposes of per se liability because they also serve
 9 advertisements.¹⁰ But using Sambreel's example of *Fashion Originators*, it defies common sense to
 10 suggest that Facebook and application developers are horizontal competitors like the adversarial
 11 garment manufacturers in that case. Sambreel's Complaint admits that Facebook offers a platform for
 12 developers to "**distribute**" their products, Compl. ¶ 19, and even alleges that Facebook and the
 13 developers operate in separate product markets, *id* ¶¶ 74-75. Labels aside, Sambreel has alleged a
 14 classic **vertical** relationship in which Facebook provides a forum, the developers use that forum, and
 15 both parties benefit. See *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 730 (1988) (holding
 16 that alleged restraints "imposed by agreement between firms at different levels of distribution [are]
 17 **vertical**").

18 **Second**, Sambreel still has not identified a boycott agreement sufficient to withstand a
 19 *Twombly* analysis. In the Opposition, Sambreel suggests the agreements in question are "the
 20 agreements by application developers to abide by Facebook's terms." See Opp'n at 18. But
 21 Facebook's Terms of Use bear no passing resemblance to the group boycott agreement in *Fashion*
 22 *Originators* involving hundreds of manufacturers and thousands of retail stores. Sambreel appears to
 23 be relying solely on the allegation that Facebook's Terms require application developers to use
 24 advertising providers on a list approved by Facebook for advertising within their applications on
 25 **facebook.com**. But it is not a "group boycott" agreement to establish terms of use for one's website; it
 26 is a fully protected right under antitrust law. E.g. *Universal Grading*, 2011 WL 846060, at *7

27
 28 ¹⁰ Sambreel's complaint arguably suggests that advertising providers are also Facebook's horizontal
 competitors. However, Facebook's Motion explained how the relationship between Facebook and
 advertising providers is vertical, *see Mot.* at 17, which Sambreel did not dispute, *see Opp'n* at 19.

1 (dismissing group boycott claim premised on eBay's policy against listing coins as "certified" on its
 2 website if graded by grading services not approved by eBay); *see also Power Ventures*, 2010 WL
 3 3291750, at *13-14.

4 **Third**, even if Sambrell had identified a true group boycott agreement between horizontal
 5 competitors, its theory plainly does not fit the Ninth Circuit's additional *Adaptive Power* factors for
 6 the per se rule.¹¹ *See Adaptive Power Sols., LLC v. Hughes Missile Sys. Co.*, 141 F.3d 947, 950 (9th
 7 Cir. 1998). Sambrell has not alleged that the "boycott" had the effect of "cut[ting] off access to a
 8 supply, facility, or market necessary to enable [Sambrell] to compete." *Id.* Moreover, while
 9 Sambrell alleges that seven advertising providers constituting 80% of PageRage's revenues **at the**
 10 **time** agreed to stop "layering" ads on Facebook, it does **not** allege that the networks that elected to
 11 discontinue their status as advertising providers or other networks were unable to immediately replace
 12 this revenue and maintain Sambrell's scheme—an omission that appears to be deliberate.¹²

13 Sambrell has also failed to plead that Facebook had a "dominant market position" by allegedly
 14 holding only a 28 percent share of the purported market for "display advertising." *See Jefferson*
 15 *Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26 (1984) (finding that a 30 percent market share "does
 16 not establish the kind of **dominant market position** that obviates the need" for a rule-of-reason
 17 analysis); *Rebel Oil Co., Inc. v. Atl. Rich. Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) ("[M]arket share of
 18 30 percent is presumptively insufficient to establish the power to control price."). Contrary to
 19 Sambrell's presumptuous suggestion, neither the *Jefferson Parish* court nor the *Rebel Oil* court
 20 confused the 30 percent threshold with monopoly power. *Id.*

21 Finally, Sambrell has no response to the argument that Facebook's enforcement of its Terms
 22 of Use has a pro-competitive justification on the face of the Complaint. *See* Mot. at 19; Opp'n at 21.
 23

24 ¹¹ Tellingly, Sambrell strenuously argues that the *Adaptive Power* factors are optional. Of course,
 25 the *Adaptive Power* court itself said that "[a]bsent such a showing, the category of activities
 26 comprising group boycotts is not to be expanded indiscriminately," 141 F.3d at 950, and none of the
 27 subsequent cases cited by Sambrell reverse that instruction. *See also In re Beer Antitrust Litig.* 2002
 28 WL 1285320, at *5 (N.D. Cal. April 3, 2002) (citing *Adaptive Power* for the proposition that "**an**
 29 **essential element** of a per se boycott claim is that the boycott cuts off access to a supply, facility or
 30 market necessary to enable the victim firm to compete").

¹² If this case were not dismissed, the evidence would show Sambrell's characterization of its
 31 "boycott" injury in the complaint to be misleading, as its internal documents show that PageRage
 32 revenues actually **increased** from July through November 2011 throughout the "boycott" period.

1 Facebook prevented an adware maker from “layering” ads into its own service. If such “boycotts”
 2 were not permissible, then true competition on the internet would be stifled because legitimate
 3 websites would have no incentive to develop and improve their un-protectable products. Indeed, the
 4 fact that Sambreel has ***no response*** to this obvious pro-competitive justification for Facebook’s
 5 conduct underscores how very far removed this case is from the Sherman Act’s true concerns.

6 **2. Sambreel Has Not Pled a Negative Tying Agreement**

7 Sambreel also has not alleged per se illegal tying, and a comparison with the tying case that
 8 Sambreel claims to be indistinguishable, *Eastman Kodak*, 504 U.S. 451, again shows why.¹³

9 In that case, the Supreme Court addressed a true “negative tying” agreement. *Id.* at 462-63.
 10 As the Court explained, “[a] tying arrangement is an agreement by a party to sell one product but only
 11 on the condition that the buyer also purchases a different (or tied) product, or ***at least agrees that he***
 12 ***will not purchase that product from any other supplier.***” *Id.* After reviewing the record, the Court
 13 found sufficient evidence for the application of the per se illegality rule because Kodak conditioned its
 14 sale of copier parts on the customer’s agreement not to buy service from any other supplier besides
 15 Kodak. *Id.*

16 By contrast, Sambreel does not allege that Facebook prohibited users from purchasing “social
 17 networking enhancement products” from “any other supplier.” Sambreel readily admits that Facebook
 18 allows numerous third-party application developers to provide “social networking enhancement
 19 products”¹⁴ to Facebook users. *See* Compl. ¶¶ 56-58, 73-75. But instead of acknowledging that this
 20 critical distinction with *Eastman Kodak* defeats its claim, Sambreel dismisses the existing limitation

21 ¹³ As discussed in the Motion, the per se rule is not even applicable to this case pursuant to *U.S. v.*
Microsoft Corp., 253 F.3d 34, 85 (D.C. Cir. 2001). *See* Mot. at 20. Sambreel attempts to distinguish
 22 that case by suggesting Microsoft’s conduct (forcing consumers to buy tied software) is somehow
 23 less coercive or problematic for antitrust purposes than Facebook’s alleged conduct (enforcing its
 24 rules to preclude the use of one adware product on its own service). *See* Opp’n at 23. If anything,
 25 these factual differences further support the inapplicability of the per se rule.

26 ¹⁴ Sambreel’s attempt to gerrymander separate product markets for “social networking enhancement
 27 products” (whatever those may be) and “social networks” must also fail. While Sambreel relies
 28 heavily on the *Eastman Kodak* court’s statement that complementary products ***can*** constitute separate
 markets, the Court in fact endorsed its earlier decision in *Jefferson Parish*, which established the
 “character of demand” test for tying claims. *See Rick-Mik Enters., Inc. v. Equilon Enter. LLC*, 532
 F.3d 963, 975 (9th Cir. 2008). Here, because no reasonable consumer would buy Sambreel’s
 “Facebook layouts” if those same layouts were offered as part of Facebook itself, there is no
 independent demand and no separate product markets. *See id.* Stripped of its labels, Sambreel is
 actually arguing that ***a modified version of Facebook*** (Sambreel’s unauthorized version) competes in
 a separate product market from Facebook itself, which is nonsensical.

1 on per se liability as mere “*loose language*” by the Supreme Court. See Opp’n at 25 n. 16. In
 2 attributing such carelessness to the Court, Sambrell does not identify a single case holding that the
 3 refusal to allow customers to use one supplier’s “complementary” product is a per se tying agreement,
 4 nor does it address the many cases that continue to follow the Supreme Court’s rule.¹⁵ Sambrell
 5 simply asks this Court to break new ground by expanding per se illegality beyond *Eastman Kodak* in a
 6 way that would have profound consequences for the internet and other industries.¹⁶

7 More generally, this is simply not a product tying case. Stripped of legal conclusions and
 8 labels, the Complaint does not allege that Facebook used its social network to force users (or anyone
 9 else) to buy any product from Facebook like the defendant did in *Eastman Kodak*. Facebook has
 10 simply established neutral rules for use of its online service, and enforced those rules against users
 11 who seek to use products that violate them. This Court need not ignore the reality of the situation
 12 when it is so apparent on the face of the Complaint. See Compl. ¶ 2 (admitting that PageRage adware
 13 “layers” advertisements not approved by Facebook into the webpages that users see “while they are
 14 accessing the Facebook website”). This is not a per se illegal tying of products.

15 **D. Sambrell Has Not Justified Its Failure to Plead a Market (Counts I-IV)**

16 As discussed in the Motion, Sambrell has not adequately pled any of its various
 17 gerrymandered markets. See Mot. at 21-25. Nothing in the Opposition changes this conclusion.

18 **Advertising “Markets”:** According to Sambrell, because the Complaint *says* that advertising
 19 within the alleged markets for “online display advertising” and “display advertising impressions to
 20 social media users” is not reasonably interchangeable with other advertising, this Court must accept
 21 the existence of separate antitrust markets. See Opp’n at 25-26. Not so. “Plaintiffs must *plead facts*
 22 showing that their product market bears a rational relation to the methodology courts prescribe to
 23 define a market for antitrust purposes—analysis of the interchangeability of use or the cross-elasticity
 24 of demand, *and it must be plausible.*” *In re ATM Fee Antitrust Litig.*, 768 F. Supp. 2d at 994-95

25 ¹⁵ *E.g. Serv. & Training, Inc. v. Data Gen. Corp.*, 963 F.2d 680, 685 (4th Cir. 1992) (“[A]ntitrust
 26 conspiracy requires evidence of a tying agreement pursuant to which . . . the buyer at least agrees that
 27 he will not purchase [repair services] *from any other supplier.*”); *In2 Networks, Inc. v. Honeywell Intern.*, 2011 WL 4842557, at *8 (D. Utah 2011) (“This type of ‘negative tie’ can be the basis of a
 28 tying claim if the buyer agrees that he will not purchase [the tied product] *from any other supplier.*”).

¹⁶ For example, under Sambrell’s interpretation, any time a website-owner blocks users with
 malicious software from accessing its website, the operator of the malicious software would have an
 antitrust claim for per se product tying sufficient to withstand a motion to dismiss.

1 (punctuation and citation omitted). This requires “*factual allegations* detailing the distinct nature of
 2 the relevant product market, the relevant product’s difference from other products, and the relevant
 3 product’s consumer base[.]” *Head-Wear Techs., LLC v. Oticon, Inc.*, 551 F. Supp. 2d 1272, 1278
 4 (N.D. Okla. 2008).

5 Sambreel has failed to plead such facts. Sambreel offers no factual allegations suggesting *why*
 6 a price increase in online display advertising would not result in advertisers shifting their budgets to
 7 online search advertising or offline display advertising, and it certainly provides no explanation of
 8 how attaching the vague “social media” label to some websites prevents other websites from acting as
 9 *reasonable* substitutes for advertising. *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 237 (2d
 10 Cir. 2008) (rejecting a proposed market on the pleadings and explaining that if a “product is *roughly*
 11 *equivalent* to another for the use to which it is put,” those products are “reasonably interchangeable”
 12 and fall within the same market). Sambreel’s labels and conclusions do not survive *Twombly* because
 13 “they merely restate a commonly used test for market definition without providing any factual basis
 14 for the claim.” *Apple, Inc. v. PsyStar Corp.*, 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008).

15 **Social Networking “Market”:** Social networking is not an antitrust market because social
 16 networks are offered for free. By definition, an antitrust market must be a “grouping of sales [by]
 17 sellers,” *Rebel Oil*, 51 F.3d at 1434, and providing free online services does not qualify, even if the
 18 services “may lead to revenue from other sources.” *Kinderstart.com, LLC v. Google, Inc.*, 2007 WL
 19 831806, at *5 (N.D. Cal. March 16, 2007). The antitrust laws are concerned with consumer welfare in
 20 the form of product pricing. Extending them to regulate completely free products on the internet does
 21 not make economic sense.

22 **E. Sambreel’s Antitrust Claims Remain Deficient for a Variety of Other Reasons**

23 **1. Sambreel Has Not Stated a Section 2 Monopolization Claim (Count III)**

24 Sambreel argues that the necessary “exclusionary conduct” element of a monopolization claim
 25 is *always* satisfied in cases involving “an alleged boycott or tying agreement.” *See* Opp’n at 28. Once
 26 again, this is impermissible pleading-by-label. The factual allegations in this case are nearly identical
 27 to the allegations of “exclusionary conduct” previously *rejected* by the courts. *E.g. LiveUniverse*,
 28 2007 WL 6865852, at *11 (finding no exclusionary conduct where MySpace “destroyed” its users’

1 ability to upload the plaintiff's video products and share the plaintiff's links on the MySpace
 2 service).¹⁷ Sambreel tries to distinguish *LiveUniverse* by suggesting that it only sanctions
 3 prohibitions against a third party's "advertising" on the defendant's website, not prohibitions against
 4 the use of a third-party's product. *See* Opp'n at 28. But the facts of *LiveUniverse* were not so limited,
 5 *see* 2007 WL 6865852, at *11 (noting that MySpace "destroyed" its users' ability to upload the
 6 plaintiff's video products); nor is the rest of the case law, *see Power Ventures*, 2010 WL 3291750, at
 7 *13-14 (finding no exclusionary conduct and affirming Facebook's right to prohibit users from using a
 8 third-party product to access Facebook). Controlling access to one's own website based on neutral
 9 terms and conditions is not exclusionary conduct under the antitrust laws. *Id.* Accordingly, Sambreel's
 10 Count III monopolization claim must be dismissed for failure to plead (a) antitrust injury, *see supra* at
 11 9-11; (b) a cognizable market, *see supra* at 15-16; and (c) exclusionary conduct.

12 **2. Sambreel Has Not Stated a Section 2 Attempted Monopolization Claim
 (Count IV)**

13 Because Sambreel does not dispute that an attempted monopolization claim also requires a
 14 showing of exclusionary conduct, *see* Opp'n at 29, its Count IV claim fails for each of the reasons
 15 listed above. Separately and independently, Sambreel's allegation that Facebook possessed only a 28
 16 percent share of the purported market likewise bars the claim. *See* Mot. at 19, 27; *Jefferson Parish*,
 17 466 U.S. at 27 n.43 ("[T]his Court has found that market shares comparable to [30 percent] do not
 18 create an unacceptable likelihood of anticompetitive conduct."); *Rebel Oil*, 51 F.3d at 1438 (9th Cir.
 19 1995) ("[M]arket share of 30 percent is presumptively insufficient to establish the power to control
 20 price [for attempted monopolization]."). In its Opposition, Sambreel *ignores* these controlling
 21 decisions and attempts to rely on one *earlier* case that arguably suggests, without actually holding,
 22 that a lower market share is sufficient. Opp'n at 29. Sambreel cannot cavalierly invite this Court to
 23 disregard intervening precedent from the Supreme Court and the Ninth Circuit.

24 **3. Neither the Rule of Reason Nor the "Quick Look" Doctrine Can Save
 Sambreel's Section 1 Claims (Counts I & II)**

25 The rule of reason requires a plaintiff to plead (a) "market power within a relevant market" and

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 28 ¹⁷ *See also Universal Grading*, 2011 WL 846060, at *9 (dismissing a monopolization claim premised
 on "eBay's refusal to deal with coin grading companies who attempt to list coins as 'certified'
 although they have not been so designated under eBay's Policy.").

1 (b) “significant anticompetitive effects” in that market. *See Newcal Indus., Inc. v. Ikon Office Sol.*,
 2 513 F.3d 1038, 1044 (9th Cir. 2008). Sambrel has not pled any cognizable market, *see supra* at
 3 15-16, and its allegation that Facebook held 28 percent of the online display ad market precludes a
 4 finding of market power, *see supra* at 13. Moreover, Sambrel has not identified “significant
 5 anticompetitive effects” because, for all the reasons discussed above, antitrust law does not concern
 6 itself with a party’s rules for accessing *its own website*. *E.g. LiveUniverse*, 304 F. App’x at 557.

7 Finally, Sambrel cannot avoid dismissal by using the phrase “quick look” in its Complaint.
 8 The quick-look doctrine is neither procedurally nor substantively applicable. Procedurally, the quick-
 9 look doctrine does not alter the well-established pleading standards for Section 1 claims, as courts
 10 consistently apply it at the evidentiary stage. *See, e.g., Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261,
 11 1266 (C.D. Cal. 2000) (considering a summary-judgment motion and rejecting the quick-look doctrine
 12 because “these facts do not demonstrate the kind of drastic effect on price or output that would
 13 warrant application of the quick look analysis”).¹⁸ Substantively, the quick-look doctrine applies only
 14 when “an observer with even a rudimentary understanding of economics could conclude that the
 15 arrangements in question would have an anticompetitive effect on customers and markets.” *Safeway,*
 16 *Inc.*, 2011 WL 2684942, at *16. It is “best reserved for circumstances where the restraint is
 17 sufficiently threatening to place it *presumptively in the per se class*, but lack of judicial experience
 18 requires at least some consideration of proffered defenses or justifications.” *Safeway, Inc.*, 615 F.3d at
 19 1178. This is plainly not such a case.

20 **F. None of Sambrel’s State Law Claims Survive Facebook’s Motion to Dismiss**

21 **1. Sambrel Has Not Properly Pled A Violation of Section 17200 (Count V)**

22 **“Unlawful” Violation:** Sambrel has not properly alleged that an “unlawful” violation of
 23 Section 17200 based on its assertion that Facebook’s “gating” of its users violated California Penal
 24 Code Section 502(c)(7). *See* Compl. ¶ 95. Sambrel does not allege that Facebook hacked into
 25 Sambrel’s servers. Stripped of legal conclusions, the Complaint suggests only that Facebook used

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 27 ¹⁸ *See also Cal. ex rel. Harris v. Safeway, Inc.*, 2011 WL 2684942, at *16 (9th Cir. July 12, 2011)
 28 (reversing the panel’s application of quick-look analysis to a summary judgment motion due to the
 lack of “evidence of actual anticompetitive impact on pricing”); *Toscano v. PGA Tour, Inc.*, 201 F.
 Supp. 2d 1106, 1121 (E.D. Cal. 2002) (rejecting quick-look analysis in reviewing a summary
 judgment motion due to the “absence of clear anticompetitive effect” of the agreement).

1 standard diagnostic tools to determine whether users accessing Facebook's website had signs of
 2 adware pollution on their browsers. But to plead a Section 502(c)(7) violation, courts have
 3 consistently held that a plaintiff must allege the defendant accessed a user's computer without
 4 permission "in a manner that overcomes technical or code-based barriers." *Power Ventures*, 2010 WL
 5 3291750, at *11; *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 716 (N.D. Cal. 2011). Sambrell
 6 does not deny that these allegations are absent from its Complaint. *See* Opp'n at 32-33.

7 Instead, in its Opposition, Sambrell incorrectly argues that the "overcomes barriers" standard
 8 applies only to "public computers." *Id.* at 33. As explained in *Power Ventures*, this standard is
 9 necessary to save Section 502(c)(7) from being void for vagueness. *See Power Ventures, Inc.*, 2010
 10 WL 3291750 at *11 (N.D. Cal. 2010). Without drawing a distinction between public and private
 11 computers, courts have stated that the statute "**must be read** to limit criminal liability to circumstances
 12 in which a user gains access to a computer, computer network, *or* website to which access was
 13 restricted through technological means." *In re Facebook*, 791 F. Supp. at 716.¹⁹

14 **"Unfair" Violation:** Nor has Sambrell properly alleged an "unfair" violation of Section
 15 17200 because its alleged "unfair" activity is coextensive with the conduct supporting its Sherman Act
 16 claims. *See* Compl. ¶ 94. In its Opposition, Sambrell argues that Facebook "ignores" *Cel-Tech*
 17 *Commc'n, Inc., v. L.A. Cellular Tele. Co.*, 20 Cal. 4th 163 (Cal. 1999). Opp'n at 32. Not true.
 18 Facebook relies on post *Cel-Tech* decisions, including from the Ninth Circuit, which conclude that
 19 where "the same conduct is alleged to support both a plaintiff's federal antitrust claims and a state-law
 20 unfair competition claims, a finding that the conduct is not an antitrust violation precludes a finding of
 21 unfair competition." *LiveUniverse, Inc.*, 304 F. App'x at 558. The Ninth Circuit considered *Cel-Tech*
 22 in reaching its decision as the *LiveUniverse* plaintiff unsuccessfully relied on *Cel-Tech*. *See* Opening
 23 Br. of Appellant at 41, 2008 WL 2559160, at *41 (9th Cir. 2008). Moreover, post-*Cel-Tech* California
 24

25 ¹⁹ Sambrell's reliance on *People v. Lawton*, 48 Cal. App. 4th Supp. 11 (1996), as a basis for not
 26 applying the "technical or code-based barriers" standard is misplaced. In *Lawton*, the defendant used
 27 a public computer terminal to "'bypass security and penetrate levels of software not open to the
 28 public' and his offense lay in such bypassing and penetration." *Chrisman v. City of Los Angeles*, 155
 Cal. App. 4th 29, 35 (2007) (discussing *Lawton*). As *Chrisman* made clear, the criminal act in
Lawton was the "bypassing and penetration," not simply accessing "levels of software not open to the
 public." *Id.* Thus, Sambrell's only purported case for this private-public distinction undercuts its
 argument, as the defendants' conduct in *Lawton* violated the *Power Ventures* standard.

1 appellate courts agree with the Ninth Circuit's reasoning:

2 [T]he determination that the conduct is not an unreasonable restraint of trade necessarily
 3 implies that the conduct is not 'unfair' toward consumers. To permit a separate inquiry into
 4 essentially the same question under the unfair competition law would only invite conflict and
 uncertainty[.]

5 *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001) (citing *Cel-Tech*); *see also SC Manuf'd*
 6 *Homes, Inc. v. Liebert*, 162 Cal. App. 4th 68, 93 (2008).

7 **2. Sambrell Has Not Pled a Tortious Interference Claim (Counts VI & VII)**

8 This Court should dismiss Sambrell's tortious interference with contract claim. *First*,
 9 Sambrell cannot rely solely on "upon information and belief" that Facebook was allegedly aware of
 10 Sambrell's contracts with eight advertisers, a necessary element of its tortious interference claim. "In
 11 the post-*Twombly* and *Iqbal* era, pleading on information and belief, without more, is insufficient to
 12 survive a motion to dismiss for failure to state a claim." *Solis v. City of Fresno*, 2012 WL 868681, at
 13 *8 (E.D. Cal. March 13, 2012). Sambrell does not attempt to distinguish or even mention the *Solis*
 14 decision in its Opposition, which was quoted in the Motion.

15 *Second*, California's privilege to enforce one's own contracts protects Facebook's alleged
 16 actions. As Sambrell concedes in its Opposition, a court may dismiss a complaint based on an
 17 affirmative defense if that defense "appears on the face of the pleading." *McCalден v. Cal. Lib. Ass'n*,
 18 955 F.2d 1214, 1219 (9th Cir. 1990); Opp'n at 34. Sambrell specifically alleges that Facebook
 19 entered "agreements" with advertising networks that allow Facebook to condition their status as
 20 advertising providers on compliance with Facebook's neutral terms, and that "Facebook **used these**
 21 **agreements** to coerce [advertising networks] to cease doing business with" Sambrell based on
 22 PageRage's prohibited ad-layering. *See* Compl. ¶¶ 21-22, 32. Thus, Facebook's alleged "coercion"
 23 was its protected enforcement of its own preexisting contracts. *See supra* at 7.²⁰

24 **CONCLUSION**

25 For these reasons and all the reasons discussed in the Motion, Sambrell's Complaint should be
 26 dismissed.

27 ²⁰ In its Opposition, Sambrell confirms that its tortious interference with prospective economic
 28 advantage claim (count VII) is based solely on "Facebook's group boycott and gating campaigns."
 Opp'n at 35. As explained in the Motion, because Sambrell's allegations for those claims are
 deficient, this claim fails as well. Mot. at 31.

1 DATED: June 15, 2012

Respectfully submitted,

2 KIRKLAND & ELLIS LLP

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2012, I electronically filed the foregoing **REPLY BRIEF IN SUPPORT OF FACEBOOK'S MOTION TO DISMISS COMPLAINT** with the Clerk of the court using the CM/ECF system which will send notification of such filing to the e-mail addresses registered, as denoted on the Court's Electronic Mail Notice List and by overnight mail delivery to the following:

Daniel Kotchen
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Washington, DC 20037

DATED: June 15, 2012

By: James F. Basile
James F. Basile